

IN THE
MISSOURI SUPREME COURT

IN THE MATTER OF THE)	
CARE AND TREATMENT OF)	No. SC 85538
MICHAEL G. NORTON,)	
Appellant.)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF CLARK COUNTY, MISSOURI
FIRST JUDICIAL CIRCUIT, PROBATE DIVISION
THE HONORABLE KARL DeMARCE, JUDGE

APPELLANT'S REPLY BRIEF

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JURISDICTIONAL STATEMENT

Michael G. Norton appeals the judgment and order of the Honorable Karl DeMarce following a jury trial committing Mr. Norton to secure confinement in the custody of the Department of Mental Health as a sexually violent predator. This appeal was transferred to this Court by the Eastern District Court of Appeals before decision. Jurisdiction now lies in the Missouri Supreme Court. Article V, Section 10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Mr. Norton incorporates the statement of facts set out in pages 4 through 23 of his initial brief, filed in Eastern District Case No. ED 81854, forwarded to this Court.

POINTS RELIED ON

I.

The probate court erred when it committed Mr. Norton to secure confinement without first considering or allowing consideration of less restrictive alternatives, in violation of Mr. Norton's right to Equal Protection of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 2 of the Missouri Constitution, in that similarly situated persons must be treated similarly and persons involuntarily committed to the Department of Mental Health other than sexually violent predators are entitled to custody and treatment in the least restrictive environment.

United States Constitution, Fifth and Fourteenth Amendments;

Missouri Constitution, Article I, Section 2.

II.

The probate court erred in denying Mr. Norton's motion to dismiss the petition filed against him, and in entering a judgment committing Mr. Norton to secure confinement in the Department of Mental Health because Section 632.483 RSMo does not require an examination by a psychiatrist or psychologist before the State may file a petition for civil commitment against a person confined in the Department of Corrections while Section 632.484 RSMo imposes such a requirement before a petition may be filed against a person not confined in DOC, and therefore violates Mr. Norton's right to Equal Protection of the law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 2 of the Missouri Constitution, in that the statutes treat similarly situated persons differently.

Johnson v. State, 58 S.W.3d 496 (Mo. banc 2001);

Amonett v. State, 98 S.W.3d 593 (Mo. App., E.D. 2003);

United State Constitution, Fifth and Fourteenth Amendments;

Missouri Constitution, Article I, Section 2; and

Sections 632.483, .484, .486, RSMo 2000.

III.

The probate court erred in denying Mr. Norton's motion to exclude statements he made during the End of Confinement report prepared pursuant to Section 632.483, RSMo because he was not advised of his right to counsel and to consult with counsel before making any statements, in violation of Mr. Norton's right to due process of the law as guaranteed by the Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution. Alternatively, if Mr. Norton is not provided counsel for the interview pursuant to Section 632.483, RSMo, he is treated differently from other persons being interviewed and evaluated for involuntary civil commitment and are provided counsel pursuant to Sections 632.320 and 632.325, RSMo, 2000, thereby denying Mr. Norton Equal Protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Missouri Constitution.

United State Constitution, Fifth and Fourteenth Amendments;

Missouri Constitution, Article I, Section 2; and

Sections 632.305, .320, .480, .483, .484, .486, RSMo 2000.

ARGUMENT

I.

The probate court erred when it committed Mr. Norton to secure confinement without first considering or allowing consideration of less restrictive alternatives, in violation of Mr. Norton's right to Equal Protection of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 2 of the Missouri Constitution, in that similarly situated persons must be treated similarly and persons involuntarily committed to the Department of Mental Health other than sexually violent predators are entitled to custody and treatment in the least restrictive environment.

Mr. Norton will rely on the argument set out in his initial brief on this Point.

II.

The probate court erred in denying Mr. Norton’s motion to dismiss the petition filed against him, and in entering a judgment committing Mr. Norton to secure confinement in the Department of Mental Health because Section 632.483 RSMo does not require an examination by a psychiatrist or psychologist before the State may file a petition for civil commitment against a person confined in the Department of Corrections while Section 632.484 RSMo imposes such a requirement before a petition may be filed against a person not confined in DOC, and therefore violates Mr. Norton’s right to Equal Protection of the law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 2 of the Missouri Constitution, in that the statutes treat similarly situated persons differently.

The State’s argument in this point is essentially that the opinion of a licensed clinical social worker is “good enough” to initiate commitment proceedings against Mr. Norton (Resp. Br. 23-26). Mr. Norton must disagree.

The end of confinement report was performed by Linda Kelley, a licensed clinical social worker employed by DOC (L.F. 25-33). Her expertise, upon which the State relies in this appeal, is no greater than that of another DOC employee,

Gerald Hoeflein, who performs end of confinement reports for DOC. **See** **Johnson v. State**, 58 S.W.3d 496 (Mo. banc 2001). Hoeflein's expertise was based on "having had the experience and educational background required by the State of Missouri, Department of Corrections, for the position I'm in." **Id.** at 497. He had performed 225 end of confinement assessments. **Id.** fn. 3. The State credits Ms. Kelley in this appeal with the same expertise: "Given the experience developed by professionals like Ms. Kelley, it is well within their expertise to determine if an offender 'may' meet the definition of a sexually violent predator." (Resp. Br. 25). Ms. Kelley has performed fifty to sixty end of confinement evaluations (Resp. Br. 25).

The State fails to listen to this Court. **Johnson v. State** stated unequivocally:

While [Hoeflein's] experience treating sex offenders conceivably would qualify him to testify as an expert on many issues, diagnoses of mental disorders is not even arguably within his area of expertise, and his testimony on that point should have been excluded.

Without Hoeflein's testimony, the state lacks sufficient evidence to support two of the three essential elements of its case – that Johnson suffers from a mental abnormality and that he suffers from a mental

abnormality that makes him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility.

Id. at 499. It is these exact conclusions Ms. Kelley was required to make in order for the State to initiate SVP proceedings against Mr. Norton pursuant to Section 632.483. A psychologist or psychiatrist, qualified to make such conclusions, are required before the State can initiate SVP proceedings against someone pursuant to Section 632.484, RSMo. Mr. Norton is denied equal protection of the law.

The State tries to rationalize its reliance on Ms. Kelley by arguing that initiation of proceedings under 632.483 differs from proceedings under 632.484 in that the former procedure has the benefit of familiarity with the inmate and extensive DOC records (Resp. Br. 25-26). One must assume, although the State does not, that Hoeflein had exactly the same familiarity and records available to him in **Johnson**. Nonetheless, he remained unqualified to express the necessary opinions. The State's approach is not justified by this argument.

Mr. Norton recognizes that **Johnson** was considered in **Amonette v. State**, 98 S.W.3d 593, 599 (Mo. App., E.D. 2003). Amonette challenged the sufficiency of the evidence presented at the Section 632.489, RSMo 2000, probable cause hearing because the DOC employee was not qualified to make a diagnosis of a mental abnormality. **Id.** The Eastern District concluded that even without a

diagnosis, the evidence was sufficient for the court to find probable cause to go forward with a trial. ***Id.*** at 599-600. Mr. Norton believes that this does not defeat his argument in this appeal.

The difference here is that this is not a question of sufficient evidence to support probable cause, but the equality of the law authorizing the State to file a Section 632.486 petition in the first place. The probable cause hearing occurs after the 632.486 petition is filed. But Section 632.483 allows the State to file the petition on an opinion of an unqualified expert, while Section 632.484 requires that the petition must be filed on the opinion of a licensed psychologist or psychiatrist. It is here, prior to the filing of the 632.486 petition and before the probable cause hearing, that equal protection is violated.

Section 632.486 commitment proceedings cannot be initiated pursuant to Section 632.484 without an evaluation and conclusion by a qualified psychiatrist or psychologist. Section 632.486 commitment proceedings were initiated against Mr. Norton pursuant to Section 632.483 without the benefit of a qualified expert to determine whether he may have a mental abnormality, and whether that abnormality makes him more likely than not to engage in predatory acts of sexual violence. Mr. Norton has been denied equal protection of the law.

III.

The probate court erred in denying Mr. Norton's motion to exclude statements he made during the End of Confinement report prepared pursuant to Section 632.483, RSMo because he was not advised of his right to counsel and to consult with counsel before making any statements, in violation of Mr. Norton's right to due process of the law as guaranteed by the Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution. Alternatively, if Mr. Norton is not provided counsel for the interview pursuant to Section 632.483, RSMo, he is treated differently from other persons being interviewed and evaluated for involuntary civil commitment and are provided counsel pursuant to Sections 632.320 and 632.325, RSMo, 2000, thereby denying Mr. Norton Equal Protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Missouri Constitution.

The State attempts to strip away Mr. Norton's statutory right to counsel and his constitutional right to equal protection of the law by suggesting that no legal "proceeding" begins until the State has filed a Section 632.486 petition against him (Resp. Br. 11-12). The State argues that in the general involuntary

civil commitment process the statutory right to counsel is provided after a legal proceeding has been initiated by the filing of a petition in the probate court (Resp. Br. 17-18). But the State ignores the environment in which these various proceedings are initiated, and overlooks the critical issue of the individual's custody within a governmental agency when the investigation and contact with the individual begins.

Section 632.305, RSMo 2000, allows a person to file a petition in the probate court to take an individual into DMH custody for a 96 hour detention and evaluation of mental condition. Immediately upon receipt of the person into DMH custody, the person must be informed of his right to counsel. Section 632.320, RSMo 2000. Unlike the State, Mr. Norton believes that it is the custody of the person for investigation and evaluation that is critical to his right to counsel, not the filing of a court pleading.

In a general civil commitment, the person is not in the custody of a governmental agency without the filing of the 632.305 petition. But Mr. Norton was already in the custody of a governmental agency, the department of corrections, when the State began its investigation into his mental status and confronted him in that process. His custody in DOC was the result of a legal proceeding, a criminal trial. A separate pleading was not required to place him

in the custody of an “agency with jurisdiction” to begin the investigation and evaluation. Section 632.480, RSMo 2000.

Mr. Norton and the subject of general civil commitment are both in the custody of a governmental agency when the investigation and evaluation begins. A person facing commitment under the general commitment statutes is placed in custody of a governmental agency by Section 632.305, Mr. Norton was placed into the custody of a governmental agency by the legal proceeding initiated by a criminal charge. What is important is that both persons have been committed to the custody of a governmental agency, not the specific means by which that custody was achieved. The investigation and evaluation begins once the person is in the custody of a governmental agency. The subject of a general civil commitment is provided counsel immediately upon being taken into custody; Mr. Norton was already in custody but is being denied counsel by the State.

The State’s argument demonstrates another equal protection violation within the sexually violent predator laws. It argues that a person pursued as an SVP is entitled to counsel only upon the filing of a 632.486 petition (Resp. Br. 12-13). This ignores another “proceeding” which may be initiated by the State. If the person sought to be committed as an SVP is not in the custody of DOC or DMH, the State can file a petition pursuant to Section 632.484, RSMo 2000, to take

the person into custody for nine days to perform an investigation and evaluation. If DMH concludes that the person may fit the definition of a sexually violent predator, the State may then file a 632.486 petition. The 632.484 petition is like the 632.305 petition. Under the State's argument, a person taken into custody pursuant to Section 632.484 is immediately entitled to counsel because a legal "proceeding" has been initiated by the filing of the petition. This is precisely the State's position in the general civil commitment process. The State's argument entitles a person being committed as an SVP initiated through Section 632.484 to counsel immediately upon being taken into custody, but denies counsel to someone already in custody and who is being committed as an SVP initiated through Section 632.483. The State has proved Mr. Norton's case.

Because the probate court erred in not excluding statements Mr. Norton made during the End of Confinement interview, the judgment and commitment order of the probate court must be reversed and the cause remanded for a new trial. In the alternative, the judgment and order must be vacated and Mr. Norton discharged from the commitment because Section 632.483 violates equal protection of the law.

CONCLUSION

Because the probate court failed to consider or to enter a judgment of confinement allowing consideration of less restrictive alternatives to secure confinement, as set out in Point I, the judgment and commitment order must be reversed and a new judgment entered considering, or permitting consideration, of confinement less restrictive than secure confinement. Because Section 632.483 denied Mr. Norton equal protection of the law, as set out in Point II, the probate court erred in not dismissing the petition, the judgment and commitment order must be reversed, and Mr. Norton must be released from the commitment to a secure facility in the custody of the Department of Mental Health. Because the probate court erred in not excluding statements Mr. Norton made during the End of Confinement interview, as set out in Point III, the judgment and commitment order of the probate court must be reversed and the cause remanded for a new trial. In the alternative, the judgment and order must be vacated and Mr. Norton discharged from the commitment because Section 632.483 violates equal protection of the law.

Respectfully submitted,

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Certificate of Compliance and Service

I, Emmett D. Queener, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Book Antiqua size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 2,691 words, which does not exceed the 7,250 words allowed for an appellant's reply brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in August, 2003. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 8th day of September, 2003, to James H. Klahr, Assistant Attorney General, P.O. Box 899, Jefferson City, MO 65102.

Emmett D. Queener